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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
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10 VALERIE HIRATA, *et al.*,

11 Plaintiffs,

12 v.

13 SOUTHERN NEVADA HEALTH  
14 DISTRICT, *et al.*,

15 Defendants.  
16

Case No. 2:13-cv-2302-LDG (VCF)

**ORDER**

17 Presently before the Court are the defendants' Motions for Summary Judgment  
18 (ECF Nos. 235, 236, 237, and 238). The plaintiffs oppose each of the motions (ECF Nos.  
19 221, 222, 223, and 224).<sup>1</sup> The Court will grant the motions.

20 Motion for Summary Judgment

21 In considering a motion for summary judgment, the court performs "the threshold  
22 inquiry of determining whether there is the need for a trial—whether, in other words, there  
23 are any genuine factual issues that properly can be resolved only by a finder of fact  
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25 <sup>1</sup> Pursuant to stipulation of the parties, the defendants withdrew and re-filed  
26 their motions for summary judgment to correct technical deficiencies. Plaintiffs relied on  
their original oppositions.

1 because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty*  
2 *Lobby, Inc.*, 477 U.S. 242, 250 (1986); *United States v. Arango*, 670 F.3d 988, 992 (9th Cir.  
3 2012). To succeed on a motion for summary judgment, the moving party must show (1)  
4 the lack of a genuine issue of any material fact, and (2) that the court may grant judgment  
5 as a matter of law. Fed. R. Civ. Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322  
6 (1986); *Arango*, 670 F.3d at 992.

7 A material fact is one required to prove a basic element of a claim. *Anderson*, 477  
8 U.S. at 248. The failure to show a fact essential to one element, however, “necessarily  
9 renders all other facts immaterial.” *Celotex*, 477 U.S. at 323. Additionally, “[t]he mere  
10 existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient.”  
11 *United States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 638 (9th Cir. 2012) (quoting  
12 *Anderson*, 477 U.S. at 252).

13 “[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after  
14 adequate time for discovery and upon motion, against a party who fails to make a showing  
15 sufficient to establish the existence of an element essential to that party’s case, and on  
16 which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. “Of  
17 course, a party seeking summary judgment always bears the initial responsibility of  
18 informing the district court of the basis for its motion, and identifying those portions of ‘the  
19 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
20 affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material  
21 fact.” *Id.*, at 323. As such, when the non-moving party bears the initial burden of proving,  
22 at trial, the claim or defense that the motion for summary judgment places in issue, the  
23 moving party can meet its initial burden on summary judgment “by ‘showing’—that is,  
24 pointing out to the district court—that there is an absence of evidence to support the  
25 nonmoving party’s case.” *Id.*, at 325. Conversely, when the burden of proof at trial rests  
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1 on the party moving for summary judgment, then in moving for summary judgment the  
2 party must establish each element of its case.

3       Once the moving party meets its initial burden on summary judgment, the non-  
4 moving party must submit facts showing a genuine issue of material fact. Fed. R. Civ. Pro.  
5 56(e); *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir.  
6 2000). As summary judgment allows a court "to isolate and dispose of factually  
7 unsupported claims or defenses," *Celotex*, 477 U.S. at 323-24, the court construes the  
8 evidence before it "in the light most favorable to the opposing party." *Adickes v. S. H.*  
9 *Kress & Co.*, 398 U.S. 144, 157 (1970). The allegations or denials of a pleading, however,  
10 will not defeat a well-founded motion. Fed. R. Civ. Pro. 56(e); *Matsushita Elec. Indus. Co.*  
11 *v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). That is, the opposing party cannot  
12 "rest upon the mere allegations or denials of [its] pleading' but must instead produce  
13 evidence that 'sets forth specific facts showing that there is a genuine issue for trial.'" *Estate of Tucker v. Interscope Records*, 515 F.3d 1019, 1030 (9th Cir. 2008) (quoting Fed.  
14 R. Civ. Pro. 56(e)).  
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#### 16 Background

17       Plaintiff Angela Jones began working in September 2008 as Environmental Health  
18 Supervisor, supervising the Pool Plan Review section of the Environmental Health Division  
19 of Defendant Southern Nevada Health District (Health District). Plaintiffs Valerie Hirata and  
20 Whitnie Taylor were Environmental Health Specialists in that section. The Pool Plan  
21 Review section processed permit applications for new construction or remodeling of public  
22 pools and spas.

23       The plaintiffs were members of the Service Employees International Union, Local  
24 1107 (the Union) and worked under a Collective Bargaining Agreement that included  
25 specific grievance and arbitration provisions.  
26

1 For a brief period until March 2009, Jones reported to an Environmental Health  
2 Manager. Following that individual's resignation, Jones reported directly to Defendant  
3 Environmental Health Director Glenn Savage.

4 In December 2008, the Virginia Graham Baker Act, a federal law requiring that  
5 public pool owners have their pools equipped with special pumps and drain covers to  
6 prevent drowning accidents, became effective. In Nevada, the installation of the equipment  
7 required pool owners to first obtain a remodel permit under Nevada Administrative Code  
8 §444 *et seq.* By early 2009, the review and approval of "VGBA remodel permit  
9 applications" was backlogged. The backlog continued to grow over the next two years. By  
10 December 2010, there were nearly 2,000 applications pending.

11 On January 4, 2011, Savage held a meeting with every manager and director in the  
12 Environmental Health Division. Jones attended the meeting. The minutes of that meeting  
13 indicate that the topic of the backlog of VGBA remodel permit applications was discussed.  
14 As recorded in the minutes:

15 Glenn stated Pool Plan Review program appears to be failing. Discussion  
16 ensued regarding past barriers, Regs, SOP's, training, failing or failed past  
17 practices, etc. Angela Jones stated those barriers were no longer present as  
18 of Dec and that her staff is now able to concentrate on completing and  
19 releasing pools and spas from plan review. There was a consensus among  
20 the group to allow Angela the first quarter of 2011 (Jan-Mar) to demonstrate  
21 the program's ability to release pools/spas. This was considered to be the last  
22 chance period for the PPR program to move forward, otherwise, restructuring  
23 the program would be necessary in order to meet expectations. Angela will  
24 be given 1<sup>st</sup> quarter in 2011 to show significant improvements in terms of  
25 releasing pools from plan review to operations. A target of 420 pool or spa  
26 releases from plan review (140 a month) was established and agreed upon  
for the quarter. This is equal to one release per day for each assigned staff  
member.

Jones directed Hirata and Taylor that they did not need to process VGBA remodel permit  
applications during this period. Hirata did not complete any VGBA remodel permit  
applications. The Pool Plan Review section completed 120 VGBA remodel permit  
applications by the end of the first quarter of 2011.

1 On April 2, 2011, the plaintiffs and other employees in the Pool Plan Review section  
2 each signed an Employee Grievance Form. For the Statement of Grievance, each form  
3 referenced an attached group statement. In their Exhibit 26, plaintiffs include nine pages  
4 that "address multiple grievances." Jones declares that the document was submitted to the  
5 Union and then forwarded to Defendant Robert Gunnoe, of the Health District's Human  
6 Resources department.<sup>2</sup>

7 On April 5, 2011, Savage issued a memorandum moving the Pool Program to be  
8 under the direction of defendant Steve Goode, Environmental Health Manager of  
9 Operations. Following this assignment, Jones reported directly to Goode, who reported to  
10 Savage. Savage also assigned defendant Amy Irani, an Environmental Health Supervisor  
11 in the Solid Waste Program, "to conduct an evaluation/assessment of the administration of  
12 the pool program. Her evaluation will include such topics as project management, data  
13 collection, distribution of information/records, time lines of projects and Environmental  
14 Health Specialists/Administrative Staff roles in the execution of assigned projects and job  
15 duties." When Irani completed her assessment, she gave her final report to Savage.

16 On April 8, 2011, Hirata submitted a binder, with more than 300 pages, to Montana  
17 Garcia of the Health District's Human Resources department. The binder included the nine  
18 pages of grievances submitted as part of Exhibit 26.

19 On April 18, 2011, Gunnoe sent an e-mail to Hirata stating that they could not  
20 proceed further with the materials dropped off with Montana until they knew more

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22 <sup>2</sup> In their opposition, the plaintiffs cite Jones' declaration and an e-mail from  
23 Gunnoe for the assertion that this Group Grievance was submitted to the Union on April 4,  
24 2011, and forwarded to Gunnoe on the same day. The evidence does not support the  
25 assertion. Jones does not indicate when the document was submitted to the Union.  
26 Further, while she asserts that the Group Grievance was forwarded to Gunnoe, she does  
not provide any foundation to establish that she is competent to testify that the grievance  
was forwarded to Gunnoe. In his e-mail, Gunnoe does not acknowledge receipt, but  
indicates only that he had seen some formal complaint forms that were dated April 2, 2011,  
which was "several days before we got any materials at all."

1 specifically who is complaining and whether all of the issues or allegations applied to all  
2 employees, or whether some aspects applied to some employees but not others. He noted  
3 that it would “help us a great deal to get some additional basic information that will allow us  
4 to proceed further.” On April 19, Hirata replied that she would “discuss these issues with all  
5 parties involved, and will contact you at a later date on how the group would like to  
6 proceed.” Jones testified that the Pool Plan Review staff decided to not respond to  
7 Gunnoe’s inquiry because Irani was conducting an evaluation, and they would work with  
8 Irani. Hirata testified that the group instead decided to participate in Irani’s assessment to  
9 address the issues, and did not provide further information to Human Resources until  
10 August 2011.

11 On April 21, 2011, Jones and Hirata each filed a Charge of Discrimination with the  
12 Equal Employment Opportunity Commission. On April 25, 2011, Taylor filed a nearly-  
13 identical Charge of Discrimination. Each asserted that, beginning January 4, 2011, the  
14 Health District had requested the Pool Plan Review section to ignore state laws to reduce  
15 backlog. Each further asserted that if they did go along with the request, the group was  
16 threatened with transfers and separations. Each further alleged they had been  
17 discriminated against on the basis of their sex and race, and retaliated against in violation  
18 of Title VII. Although each plaintiff received a right to sue letter, none filed a complaint  
19 based on the Charges.

20 In June 2011, Hirata and another Pool Plan Review employee attended a breakfast  
21 with the defendant Lawrence Sands, the Health District’s Chief Health Officer. Hirata gave  
22 the binder to Sands.<sup>3</sup> Sands met with Savage regarding the binder, and indicated he would  
23 be sending the binder to Human Resources to investigate. Sands testified that he told  
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25 <sup>3</sup> Plaintiffs assert that their Exhibit 37 is a copy of a written statement that  
26 Hirata read to Sands. They do not cite to any evidence to support their assertion that  
Hirata read the statement.

1 Savage that he was holding Savage accountable for ensuring the program was operating  
2 as it needed to and that “everybody had to be held accountable, you know, for their  
3 performance and achieving the goals of the program.”

4 On August 9, 2011, Goode issued Jones a Coaching and Counseling, identifying  
5 numerous employee performance issues. A Coaching and Counseling is a pre-disciplinary  
6 action that is not placed in an employee’s permanent Human Resources file, but is kept  
7 only in the supervisor’s file for that employee. Goode testified that he did not prepare the  
8 written Coaching and Counseling statement. He further testified that he did not agree with  
9 several of the assessments in the document, and that he had not observed conduct by  
10 Jones reflected in those assessments. Goode testified he believed that the document had  
11 been written by Robert Newton at the direction of Savage.

12 On August 28 and 29, 2011, staff of the Pool Plan Review section signed a nine-  
13 page document that started: “This document is a group retaliation statement written by  
14 members of the Pool Program for Southern Nevada Health District Chief Health Officer Dr.  
15 Sands.” The document then recites the intent of its authors to submit the document to  
16 Goode, to be given to Savage, to be given to Sands, thus complying with the Health  
17 District’s chain of command.

18 On August 31, 2011, Jones received a written reprimand from Goode. The  
19 reprimand noted the prior Coaching and Counseling, and specifically the counseling to  
20 provide complete information in a timely manner as well as providing professional and  
21 succinct communication. The reprimand noted an update provided by Jones, indicating the  
22 update contained extraneous personal opinions and suggestions. It further noted that the  
23 document submitted for payroll processing “was extremely large and appeared purposefully  
24 voluminous” and included redundant copies of itineraries, e-mails, and memos. The  
25 reprimand also noted the August 29, 2011, document, noting it had been submitted to  
26 Human Resources. The reprimand noted the August 29, 2011 document referenced

1 “confidential information” in the prior Coaching and Counseling. As such, Jones was  
2 reprimanded for disclosing the “confidential information” from her Coaching and Counseling  
3 to her subordinates.

4 On September 15, 2011, Savage and Goode suspended Jones for three days for  
5 statements she made during an e-mail exchange with Goode.

6 On September 21, 2011, Savage placed Jones on paid administrative leave  
7 “pending further investigation of possible violations of the District’s Personnel Code and EH  
8 policies.” The memorandum did not identify the asserted violations. Jones was directed to  
9 not communicate with any Health District staff other than in Human Resources, her  
10 manager, or her Union representative, and that any conduct in violation of this instruction  
11 would be viewed as insubordination.

12 On September 22, 2011, Jones grieved the suspension. On October 11, 2011, a  
13 Hearing Officer issued a memorandum recommending that the proposed suspension not  
14 be imposed. The Hearing Officer determined that Jones’ “actions indicate she may have  
15 issues with following directives and her style of communication appears excessive and over  
16 documented.” The Hearing Officer also noted, however, the relatively short period of time  
17 from the first Coaching and Counseling to suspension was insufficient to allow Jones to  
18 develop a significant change in her style of communication or for her management team to  
19 assist her with a better method of communicating.

20 On September 22, 2011, the “bargaining unit employees of the SNHD pool program”  
21 filed a formal grievance with Human Resources through the Union. A formal Step I  
22 Grievance Hearing was convened on October 4, 2011. On October 18, 2011, the Hearing  
23 Officer (defendant Angus MacEachern) denied the grievance. The Union did not request  
24 arbitration.

25 On October 18, 2011, Savage notified Jones that he was rescinding the proposed  
26 three-day suspension of September 15, 2011. Savage assigned Jones to what the Health



1 District terms a "Supervisory Administrative Project" as they had previously discussed on  
2 October 11, 2011. Jones was tasked with providing a complete narrative description of the  
3 reason for and functions of the Pool Plan Review section, and providing complete and  
4 rigorous documentation to assist in day-to-day management of the Pool Plan Review  
5 section in six different areas. While Jones was assigned to this project, she did not actively  
6 supervise the Pool Plan Review section.

7 At about the same time, additional staff were assigned to the Pool Plan Review  
8 section, with defendant Susan LaBay supervising one team that included defendant Jackie  
9 Raiche-Curl, Lorraine Forston, Steve Zimmerman and plaintiff Taylor. Hirata continued to  
10 work with the other Pool Plan Review group.

11 On November 2, 2011, Taylor sent an e-mail to Goode and Garcia attaching an e-  
12 mail chain between Goode and Zimmerman indicating that she agreed with Zimmerman's  
13 position. She further noted that she would follow the directives of her supervisor, but that  
14 she did not agree to "not follow the installation guide of the equipment, approve projects  
15 where the pools and spas are not sound and to approve equipment not installed correctly  
16 just to move the project out of Plan Review." On November 14, 2011, and December 11,  
17 2011, Taylor received Coaching and Counseling regarding her work performance. The  
18 Coaching and Counseling were administered by LaBay, Taylor's supervisor.

19 Taylor submitted her resignation on August 29, 2012, effective September 7, 2012,  
20 stating that "the targets and methods of accomplishing the daily required six inspections in  
21 extreme heat forsaking health and safety of the general public has made it mentally and  
22 physically impossible for me to continue in this manner."

23 On January 20, 2012, Goode issued a Coaching and Counseling to Hirata for failing  
24 to meet the established job performance standard for each Pool Plan Review staff of an  
25 average of 5 service requests per week. Hirata acknowledged, in her deposition, that her  
26 productivity was low but explained that it was the result of assisting Jones with her tasks.

1 She was counseled to bring forward concerns to her management if she is aware that she  
2 is unable to meet an established performance standard, and to report daily. Success  
3 would be measured by meeting the established work performance measures. She was  
4 expected to move a minimum of 60 service requests or variances during the next three  
5 months. On January 31, 2012, Hirata submitted a proposed 90-day Plan of Action  
6 identifying the proposed variances, completed plan reviews, and completed projects  
7 through April 19, 2012 (90 days after the coaching and counseling). Hirata proposed  
8 completing a total of 71 projects and 6 variances. She identified additional and unforeseen  
9 issues and projects that might cause her to not meet her goal. Goode accepted the plan.

10 On April 6, 2012, Goode sent Hirata an e-mail praising her for her performance  
11 during March. Hirata replied that she would have completed 53 projects by the end of the  
12 day, and anticipated completing 60 by the end of the following week.

13 On June 27, 2012, Goode sent Hirata a memorandum regarding a meeting of the  
14 day before. The memo noted that Hirata had achieved her goal during the three-month  
15 period, indicating she could meet the performance standard, but that her work performance  
16 was again at a sub-par level.

17 On July 11, 2012, Savage placed Hirata on Paid Administrative Leave pending  
18 further investigation of possible violations of the Health District's personnel code. Prior to  
19 that time, documents were discovered in a box under Hirata's desk. Many of the  
20 documents concerned work performed during the three-month period, but which had not  
21 been turned in for review and approval by Goode. A review of the documents also  
22 indicated other errors by Hirata in performing her work. On July 23, 2012, Savage  
23 proposed a twenty-day suspension without pay commencing July 24, 2012. Hirata formally  
24 grieved the suspension on August 3, 2012. At the hearing, the Health District and the  
25 Union negotiated a reduction of the suspension from twenty days to three days. Hirata  
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1 testified that she consulted legal counsel as to whether to pursue arbitration, and elected to  
2 not do so.

3 After returning from her suspension, Hirata was to perform two inspections while  
4 being observed by two supervisors. Though the second inspection was located just a few  
5 minutes from the first inspection, Hirata got lost, did not arrive at the second inspection,  
6 and did not notify the supervisors. Raiche-Curl issued a Coaching and Counseling for the  
7 failure to communicate with her supervisors.

8 On September 21, 2012, Hirata submitted her resignation (effective October 5,  
9 2012), asserting that she considered her current working conditions to be hostile, unhealthy  
10 and retaliatory.

11 In March 2012, Jones resumed her duties as a supervisor. On April 25, 2012,  
12 LaBay completed a review of the documents submitted by Jones regarding her work on the  
13 Supervisory Administrative Project. Labay stated her opinion that Jones should have been  
14 able to easily complete the six projects “[g]iven the fact that Ms. Jones was unable to  
15 supervise her staff for a 6-7 month period.” She further noted her conclusion that not one  
16 project had been completed, that most had not been started, and that the submitted  
17 material indicated that Jones had completed “very little original work.”

18 In April, a co-worker reported that Jones had placed another co-worker’s Health  
19 District-issued computer in her car. Defendant Kimberly DiPasquale, a Human Resource  
20 Analyst, conducted an investigation that concluded with her report on May 17, 2012. She  
21 concluded that Jones had removed the computer without authorization.

22 Based on both the deficient work product and the taking of Health District property  
23 without authorization, Savage demoted Jones to Environmental Health Specialist II  
24 effective May 23, 2012, and re-assigned her to a field assignment under the supervision of  
25 LaBay. Through the Union, Jones formally grieved her demotion. A Step I hearing was  
26 held on August 29, 2012, and the Hearing Officer denied the grievance on August 31,

1 2012. On September 6, 2012, the Union notified Human Resources that it was intending to  
2 arbitrate, and requesting that the grievance be held in abeyance pending the Union's  
3 decision whether it would proceed with the arbitration. On October 2, 2012, the Union  
4 notified Jones that it would not arbitrate her grievance, and would officially withdraw her  
5 case. The Union also indicated to Jones that she still had a right to appeal.

6 On December 10, 2012, Jones submitted her letter of resignation effective  
7 December 21, 2012.

#### 8 Analysis

##### 9 First Amendment Retaliation Claim - Statute of Limitations

10 The defendants argue that, as the statute of limitations is two years, and as the  
11 plaintiffs filed their complaint on December 18, 2013, their First Amendment claim is barred  
12 to the extent it is based on adverse employment actions occurring before December 18,  
13 2011. In response, the plaintiffs argue that their claims for constructive discharge did not  
14 accrue until they submitted their letters of resignation. The plaintiffs do not offer any  
15 argument that their retaliation claim is not barred as to adverse employment actions  
16 occurring prior to December 18, 2011. Accordingly, the Court will grant summary judgment  
17 on the retaliation claim to the extent that it seeks recovery for any adverse employment  
18 action prior to December 18, 2011.

##### 19 First Amendment Retaliation Claim - Merits

20 The controlling Supreme Court decision is *Garcetti v. Ceballos*, which held "that  
21 when public employees make statements pursuant to their official duties, the employees  
22 are not speaking as citizens for First Amendment purposes, and the Constitution does not  
23 insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S.  
24 410, 421 (2006). The Ninth Circuit has provided a further test in order to determine when a  
25 public employee's speech receives First Amendment protection: "First, the plaintiff bears  
26 the burden of showing that the speech addressed an issue of public concern . . . . Second,

1 the plaintiff bears the burden of showing the speech was spoken in the capacity of a private  
2 citizen and not a public employee . . . . Third, the plaintiff bears the burden of showing the  
3 state took adverse employment action and that the speech was a substantial or motivating  
4 factor in the adverse action . . . . Fourth, if the plaintiff has passed the first three steps, the  
5 burden shifts to the government to show that . . . the state's legitimate administrative  
6 interests outweigh the employee's First Amendment rights . . . . Fifth and finally, if the  
7 government fails the [above] balancing test, it alternatively bears the burden of  
8 demonstrating that it would have reached the same adverse employment decision even in  
9 the absence of the employee's protected conduct." *Eng v. Cooley*, 552 F.3d 1062 (9th Cir.  
10 2009) (quotations and citations omitted).

11 While the plaintiffs cannot maintain this claim based on adverse employment actions  
12 that occurred prior to December 18, 2011, an issue remains whether they were subject to  
13 any retaliatory acts after that date, regardless of whether the protected speech occurred  
14 prior to that date. The plaintiffs allege they engaged in ten separate acts of protected  
15 speech between April 4, 2011, and November 2, 2011. They identify the first two such acts  
16 as their submission of a Group Grievance to the Union and to Human Resources on April  
17 4, 2011. The third act of protected speech was the delivery of a the Group Grievance  
18 Binder on April 8, 2011, to Garcia of Human Resources. The fourth act was plaintiffs' filing  
19 of EEOC charges on about April 21, 2011, in which each alleged the Health District had  
20 instructed them to ignore state law in their jobs. The fifth and sixth protected acts were  
21 Hirata's statement to Sands on July 2011, and her act of giving him the same Group  
22 Grievance Binder previously submitted to Human Resources. The seventh protected act  
23 was the Group Retaliation Statement written by the staff of the Pool Plan Review section in  
24 response to a request by Sands. The eighth protected act was Hirata's meeting with a  
25 county commissioner, in which Hirata asserts that she spoke about various issues that are  
26 consistent with the other asserted acts of protected speech. The ninth protected act was

1 the Pool Plan Review employees' filing of a Group Grievance in September 2011. The  
2 final protected act was Taylor's November 2, 2011, e-mail to Goode and Garcia indicating  
3 that she would follow the directives of her supervisor, but that she did not agree to "not  
4 follow the installation guide of the equipment, approve projects where the pools and spas  
5 are not sound and to approve equipment not installed correctly just to move the project out  
6 of Plan Review."

7 Initially, the Court must note that the plaintiffs have not offered competent evidence  
8 as to when the Health District or any of the individual defendants first became aware of the  
9 April Group Grievance prior to April 5, 2011. Hirata declared and testified that she  
10 submitted the Binder, which contained the April Group Grievance, to Garcia on April 8,  
11 2011. Jones declared that the April Group Grievance was submitted to the Union and then  
12 forwarded to Human Resources, but does not identify the date on which this occurred.  
13 Gunnoe's April 18, 2011, e-mail does not establish the date he first became aware of the  
14 April Group Grievance. Accordingly, the plaintiffs are also unable to maintain their claim to  
15 the extent it is based on adverse actions occurring prior to April 8, 2011.

16 The Court also cannot conclude that every statement within the April Group  
17 Grievance, and the Binder within which it was contained, amounted to protected speech.  
18 The Court cannot accept plaintiffs' suggestion as to the breadth of the "public concern"  
19 prong. It would appear to the Court that, as suggested by plaintiffs, every public  
20 employee's criticism of a co-worker, subordinate, or supervisor as inefficient, incompetent,  
21 or is otherwise careless, would constitute a matter of public concern. Similarly, the  
22 plaintiffs' argument suggests that any identification of a co-worker's error in completing a  
23 form documenting a regulated structure is a matter of public concern. Though the "public  
24 concern" prong is to be construed broadly, the Court will not construe so broadly that any  
25 speech by a public employee regarding any aspect of their public employment constitutes a  
26 matter of public concern. Of particular concern to the Court is that, while the Binder and

1 April Group Grievance may contain some speech directed to public concerns, the vast  
2 majority of the speech does not address matters of public concern. The content of the  
3 Binder reflects its context. In January 2001, following a meeting of all supervisors and  
4 managers, Savage tasked the Pool Plan Review section with completing the review of 20  
5 remodel pool plan applications each month by each staff member (effectively, one remodel  
6 pool plan application reviewed each business day). Statements within the Binder reflect  
7 Jones' perception of the mis-perceptions of other supervisors and managers, particularly as  
8 to mis-perceptions relevant to the measuring of productivity through the release of pool  
9 plans. To a great extent, the Binder appears to be compiled to alert other Health District  
10 employees of the issues impeding the productivity (as measured by the completion of Pool  
11 Plan reviews) of Pool Plan Review staff. Within this context, it becomes difficult to  
12 conclude that the few statements that might otherwise be of public concern were uttered  
13 because the speaker considered them to be of public concern, rather than the internal  
14 employment matter regarding the propriety of measuring productivity by completion of  
15 remodel pool plan applications.

16 Further, even if the Binder and its included April Group Grievance were considered  
17 to be a matter of public concern, the plaintiffs have not shown they were speaking as  
18 private citizens when Hirata delivered the Binder (and its included Group Grievance) to  
19 Garcia. The plaintiffs argue that they were speaking as private citizens because their  
20 specific job duty did not include disseminating a group grievance outlining illegal behavior.  
21 The argument fails as it is, again, overly broad. Whether the plaintiffs were speaking as  
22 private citizens must be considered within the context of that speech. Stated otherwise, the  
23 content of the Binder and April Group Grievance reflects the speech of a public employee  
24 acting as an employee, rather than a public employee acting as a private citizen.

25 Finally, even if the April Group Grievance and Binder were considered speech on a  
26 public matter by a private citizen, the plaintiffs have not shown that they were subject to

1 adverse employment actions because of the speech. In their opposition, the plaintiffs  
2 identify Irani's negative evaluation of the Pool Program Review section as the adverse  
3 employment action, and attribute this action not only to Irani, but also to Savage, Gunnoe,  
4 MacEachern, and Sands because each, in some way, was aware that the evaluation was  
5 being performed. While the plaintiffs complain of some of Irani's conclusions and  
6 observations, and offer testimony of others indicating their disagreement with those  
7 conclusions and observations, such disagreement does not establish that either the  
8 performance of the evaluation, or Irani's completed report, amounted to an adverse  
9 employment action. In sum, the plaintiffs have not offered evidence supporting a plausible  
10 inference that Savage ordered the evaluation, or that Irani performed the evaluation, as an  
11 adverse employment action against the plaintiffs or the other staff of the Pool Plan Review  
12 section.

13 Hirata's delivery of the Binder, as well as her additional statements, to Sands on July  
14 5, 2011, also fails to support a claim for retaliation. The Court assumes that, because the  
15 Binder included the April Group Grievance, the delivery of the Binder to Sands constitutes  
16 speech by each of the plaintiffs. Hirata's separate statement to Sands, however, is  
17 attributable as speech only of Hirata, and not of Jones or Taylor. While the content of the  
18 Binder and April Group Grievance did not change, Hirata's act of delivering the Binder  
19 outside of the chain of command suggests the plaintiffs were speaking as private citizens  
20 (despite the speech itself indicating that it was uttered as public employees).

21 However, assuming the speech of Hirata and the other plaintiffs to Sands was on a  
22 matter of public concern in the capacity of private citizens, the plaintiffs have not identified  
23 any nexus between that speech and an adverse employment action. The plaintiffs point to  
24 Jones receiving a Coaching and Counseling on August 9, 2011. As previously noted,  
25 Jones cannot maintain a retaliation claim on this adverse action as it is barred by the  
26 statute of limitations. The plaintiffs have not offered any plausible argument that the



1 actions taken against them in 2012 were in response to Hirata delivering the binder to  
2 Sands on July 5, 2011.

3 As noted previously, the plaintiffs identified their Group Retaliation Statement, made  
4 in response to a request from Sands as the seventh protected act of speech. The plaintiffs  
5 identify the adverse actions following these acts of speech as the written reprimand to  
6 Jones and Jones' three-day suspension. As the written reprimand indicates it was written  
7 with awareness of the Group Retaliation Statement, and as the three-day suspension  
8 rested, in part, on the written reprimand, a plausible inference exists that the actions were  
9 taken in response to protected speech. While the defendants have proffered a legitimate  
10 reason for the written reprimand and suspension, the totality of the evidence does not  
11 permit a conclusion, as a matter of law, that the state's interest outweighed Jones' speech  
12 rights or that the defendants would have taken the action despite Jones' speech. However,  
13 as noted previously, as these adverse actions occurred prior to December 18, 2011, the  
14 statute of limitations precludes Jones from maintaining her retaliation claim to the extent it  
15 is based on these actions.

16 The plaintiffs identify Hirata's conversation with a county commissioner as their  
17 eighth act of protected speech. This act of speech, however, is attributable as the speech  
18 of Hirata, and not of Jones or Taylor. Hirata testified that, following this conversation,  
19 Savage directed her that she was not to have contact with people outside of the Health  
20 District regarding Health District issues. Assuming Hirata's conversation to the county  
21 commissioner was on a matter of public concern by a private citizen, the Court would  
22 conclude that the direction provided by Savage to Hirata would be an adverse employment  
23 action. That is, the Court finds that the act of giving the direction to Hirata, which was given  
24 in the employment context from a supervisor to a subordinate, would have the effect of  
25 chilling Hirata's protected speech. Hirata also testified, however, that this direction was  
26 given within weeks of her meeting with the county commissioner. Accordingly, as this

1 adverse action occurred prior to December 18, 2011, the statute of limitations precludes  
2 Hirata from maintaining her retaliation claim to the extent it is based on this action.

3         The plaintiffs identify their ninth act of protected speech as the September 22, 2011,  
4 Group Grievance which broadly alleged that the workplace environment violated state and  
5 federal law. A formal hearing was set and convened for the September Group Grievance,  
6 and the grievance was denied in October. Assuming the broad allegation of the  
7 September Group Grievance constitutes protected speech on a matter of public concern by  
8 a private citizen, the plaintiffs have not shown they were subject to an *adverse* employment  
9 action. The plaintiffs propose that the adverse actions were (1) the re-assignment of Jones  
10 in which she was relieved of supervisory responsibilities and was instead tasked with a  
11 supervisory administrative project, and (2) the assignment of Taylor to a second, separately  
12 supervised group of staff in the Pool Plan Review section.

13         The evidence establishes that, in October 2011, additional staff were added to the  
14 Pool Plan Review section with a second group created and separately supervised. In  
15 addition, Jones was temporarily relieved of her supervisory duties with instructions to work  
16 on six projects that addressed several of the critical issues asserted by the Pool Plan  
17 Review section. While the action occurred in temporal proximity to plaintiffs' speech,  
18 neither Jones nor Taylor has met her burden of showing the action was adverse. A  
19 plausible inference can be drawn that the reorganization and additional staffing was in  
20 response to the speech of the staff of the Pool Plan Review section over the prior months.  
21 That inference requires recognizing, however, that the actions taken by defendants were  
22 largely and primarily consistent with the actions that had been requested by the staff of the  
23 Pool Plan Review section. The plaintiffs and other employees argued for additional staff;  
24 Pool Plan Review was assigned additional staff. The assignment of that additional staff  
25 necessarily resulted in some reorganization. Taylor has not offered any evidence raising a  
26 plausible inference that her assignment resulted from her act of signing either the

1 September Group Grievance, the August Group Retaliation Statement, or the April Group  
2 Grievance that was included in the Binder.

3 Similarly, Jones has not offered evidence raising a plausible inference that the  
4 decision to remove her supervisory duties and have her work on a supervisory  
5 administrative project was an adverse action in retaliation for signing the September Group  
6 Grievance, the August Group Retaliation Statement, or the April Group Grievance that was  
7 included in the Binder. As indicated from the content of the Binder, the plaintiffs and other  
8 employees asserted a need to establish procedures and correct certain past deficiencies  
9 that would permit the efficient completion of remodel pool plan applications; Jones was  
10 provided an opportunity to specifically address and resolve those concerns. To the extent  
11 that the decision to relieve her of her supervisory duties can be considered adverse, the  
12 defendants have met their burden of showing a legitimate need outweighing Jones' First  
13 Amendment rights. The totality of the evidence suggests an inference to which all parties  
14 continually allude: there were issues concerning the work and productivity of the Pool Plan  
15 Review section. The plaintiffs, and other Pool Plan Review staff, acknowledged some  
16 responsibility for these issues but otherwise largely attributed the issues to external factors  
17 (that is, external to the group of Pool Plan Review employees in 2011). The defendants,  
18 and particularly the management directly responsible for the Pool Plan Review section  
19 (other than Jones) attributed the issues to Jones and to the low-productivity of her staff  
20 (rather than issues faced by her staff). In this context, the defendants could legitimately  
21 engage in an effort to reorganize the Pool Plan Review section, including giving Jones a  
22 temporary task relevant to her work as the supervisor that would require her full attention.  
23 Jones has not shown that the defendants' decision to temporarily re-assign her was  
24 pretextual to cover a retaliatory act.

25 Finally, the plaintiffs identify Taylor's November 2011 e-mail as their tenth protected  
26 act of speech. This act of speech, however, is attributable only as to Taylor. Assuming

1 that Taylor's e-mail to Goode and Garcia constitutes protected speech, she has not shown  
2 that the defendants took an adverse employment action against her, for which the speech  
3 was a substantial or motivating factor in the adverse action, after December 18, 2011. The  
4 plaintiffs identified the adverse action against Taylor as the Coaching and Counseling she  
5 received in November and December of 2011. The statute of limitations bars Taylor from  
6 maintaining her retaliation claim to the extent it is based on these acts. Further, while the  
7 evidence establishes a temporal proximity to Taylor's speech, the defendants have shown  
8 a legitimate state interest that outweighed Taylor's right. Specifically, the evidence  
9 establishes that Taylor received the Coaching and Counseling for low-productivity.

10 The plaintiffs argue that they were also subject to the following adverse employment  
11 actions in 2012 in retaliation for their speech in 2011: Hirata received a Coaching and  
12 Counseling on January 12, 2012; LaBay gave a negative peer review, on April 25, of  
13 Jones' work performed as part of the employee action plan; Jones was demoted on May  
14 22, for taking a computer home;<sup>4</sup> some Group Grievance information that was stored at the  
15 desks of Jones and Hirata was destroyed;<sup>5</sup> LaBay issued a report regarding the documents  
16 that were retrieved from Hirata's desk; Hirata was placed on Paid Administrative Leave in  
17 July 2012; Hirata was suspended for 20 days; the Health District offered Hirata a Last  
18 Chance Agreement; Jones was required to perform an outdoor pool inspection during the  
19 afternoon of a high heat advisory day on her return from leave; Hirata received a Coaching

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21 <sup>4</sup> The evidence establishes that Jones was also demoted for her deficient work  
22 performance which was reported by LaBay in her review of Jones' work.

23 <sup>5</sup> While the plaintiffs suggest this destruction occurred on Memorial Day in  
24 2012, they offer no evidence to support the suggestion. The evidence permits an inference  
25 that documents were retrieved from the desks of Hirata and Jones on that day. The  
26 evidence also permits an inference that, at a later time, some documents (which may or  
may not have been the documents collected on Memorial Day) were later destroyed,  
perhaps merely by being placed in a recycling bin. The defendants have offered evidence  
that the only documents that were destroyed were the extra copies that duplicated  
documents that were not destroyed.

1 and Counseling to Hirata for getting lost; Jones and Hirata lost access to their work e-mail  
2 accounts in August of 2012; and finally the constructive discharge of each plaintiff from  
3 August to December 2012.

4 Hirata cannot maintain her claim based on the actions taken against her beginning  
5 in January 2012 with the Coaching and Counseling for low work performance and  
6 culminating in her three-day suspension and the Health District's requirement that she sign  
7 a Last Chance Agreement. This Coaching and Counseling, which occurred several months  
8 after her last asserted act of protected speech, concerned Hirata's low work performance.  
9 The evidence establishes that, following the Coaching and Counseling, and pursuant to her  
10 own plan of action, Hirata's work performance improved for three months. The evidence  
11 also establishes, however, that (contrary to Hirata's representations to her manager) she  
12 had not fully completed the work, and that she had committed errors in her work. This  
13 evidence was the result of the discovery of documents in a box under Hirata's desk and in  
14 her desk. While Hirata argues (as an additional adverse action against her) that this  
15 evidence was purged and destroyed, she offers no competent evidence to support that  
16 argument. While Hirata argues the review of those documents was an adverse action, the  
17 defendants had a legitimate interest in reviewing the documents. The documents  
18 concerned the work for which Hirata was publicly employed. Hirata argues that the  
19 conclusions of the review were adverse. The Court agrees, but Hirata offers no competent  
20 evidence that the conclusions were inaccurate. Rather, the evidence establishes that the  
21 defendants imposed a 20-day suspension on Hirata as a result of her conduct relative to  
22 the documents. Hirata grieved that suspension. She was represented by the Union at the  
23 hearing, and ultimately the parties agreed to a reduction of the suspension from twenty  
24 days to three days on condition that Hirata sign a Last Chance Agreement. Although  
25 Hirata subsequently refused to sign the Last Chance Agreement, the Health District  
26 complied with its agreement to reduce the suspension to three days. Given the

1 circumstances, the Union considered this resolution a win for Hirata. This evidence  
2 requires the conclusion, as a matter of law, that the actions of the defendants arose from  
3 Hirata's work performance in 2012, and not in response to the identified acts of speech in  
4 2011.

5 Similarly, Hirata has not shown that the Coaching and Counseling she received in  
6 August 2012 was in response to her speech in 2011. The evidence establishes that she  
7 received this Coaching and Counseling for failing to communicate with her supervisors.<sup>6</sup>  
8 The evidence further establishes that the Coaching and Counseling was in response to  
9 Hirata's failure to communicate with her superiors that she had become lost while  
10 attempting to travel to a location where she would perform a pool inspection while being  
11 observed by two supervisors. Hirata does not dispute that the two supervisors waited for  
12 more than 45 minutes after the time they expected Hirata to arrive, but did not receive any  
13 communication for Hirata. That Hirata did not have a Health District phone, but had only  
14 her personal phone, does not raise a triable issue of fact that the action was taken in  
15 response to the failure to communicate in August 2012, rather than because of speech that  
16 occurred more than ten months prior to that time.

17 The alleged retaliatory acts against Jones in 2012 fail for similar reasons. Jones  
18 identifies the review of her work product while relieved of her supervisory duties and her  
19 demotion based on that deficient work product as well as her unauthorized removal of  
20 Health District property as adverse actions. The evidence also establishes, however, that  
21 Jones grieved the decision to demote her. The hearing officer denied Jones' appeal and  
22 the Union then made the decision to not pursue arbitration of the decision. Jones did not  
23 pursue arbitration of the decision. The defendants have shown a legitimate reason for  
24 engaging in the conduct of reviewing Jones' work, for investigating Jones' removal of

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25 <sup>6</sup> The plaintiffs' characterization that Hirata received the Coaching and  
26 Counseling for getting lost is unsupported by the evidence.

1 Health District property, and for imposing discipline as a result of its findings. Jones has  
2 not raised a triable issue of fact that the Health District's actions in May 2012 were pretext  
3 to cover retaliation for Jones' speech in 2011.

4 Jones also identifies, as an adverse action, the requirement that she perform an  
5 outdoor pool inspection during the afternoon of a high heat advisory day upon her return  
6 from leave. Jones does not offer any evidence, however, that this was a unique  
7 employment action, and that other staff of the Pool Plan Review section were not required  
8 to perform pool inspections in similar conditions. Jones does not offer any evidence that  
9 the defendants impeded her ability to perform in a safe manner as she had been trained.

10 Hirata and Jones complain that, upon their return to work in August 2012, they had  
11 restricted access to their work e-mails and other information necessary to perform their  
12 tasks. Neither offers evidence that this action was in response to their speech more than  
13 10 months prior.

14 Finally, the plaintiffs' decisions to resign in late 2012 do not constitute an adverse  
15 and retaliatory act by the defendants for the plaintiffs' speech in 2011. Accordingly, the  
16 Court will grant summary judgment to the defendants on plaintiffs' claims that they were  
17 subject to retaliation in 2012 for protected acts of speech that occurred not later than  
18 September 2011.

#### 19 Constructive Discharge

20 According to the Nevada Supreme Court, a "tortious constructive discharge is shown  
21 to exist upon proof that: (1) the employee's resignation was induced by actions and  
22 conditions that are violative of public policy; (2) a reasonable person in the employee's  
23 position at the time of resignation would have also resigned because of the aggravated and  
24 intolerable employment actions and conditions; (3) the employer had actual or constructive  
25 knowledge of the intolerable actions and conditions and their impact on the employee; and  
26

1 (4) the situation could have been remedied.” *Martin v. Sears, Roebuck and Co.*, 111 Nev.  
2 923, 926 (1995). The plaintiffs’ constructive discharge claims fail because they have not  
3 shown that the employment conditions to which they were subjected were aggravated and  
4 intolerable. Further, even assuming an issue of fact existed whether the conditions were  
5 intolerable, they have not shown that such was because of their speech rather than  
6 because of the productivity expectations of the Health District.

7 Conspiracy

8 The plaintiffs’ final claim alleges that the individual defendants committed civil  
9 conspiracy in that they “intentionally and unlawfully” sought to violate the plaintiffs’ First  
10 Amendment rights and induce their resignations (#1, ¶ 528). “To state a cause of action for  
11 civil conspiracy, the complaint must allege: 1) the formation and operation of the  
12 conspiracy; 2) the wrongful act or acts done pursuant thereto; and 3) the damage resulting  
13 from such act or acts.” *Ungaro v. Desert Palace, Inc.*, 732 F. Supp. 1522, 1532 n.3 (D.  
14 Nev. 1989).

15 “The alleged facts must show either expressly or by reasonable inference that  
16 Defendant had knowledge of the object and purpose of the conspiracy, that there was an  
17 agreement to injure the Plaintiff, that there was a meeting of the minds on the objective and  
18 course of action, and that as a result one of the defendants committed an act resulting in  
19 the injury.” *Id.* In Nevada, “[a]gents and employees of a corporation cannot conspire with  
20 the corporate principal or employer where they act in their official capacities on behalf of  
21 the corporation and not as individuals for their individual advantage.” *Collins v. Union Fed.*  
22 *Sav. & Loan Ass’n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983).

23 The plaintiffs have not raised a triable issue of facts that the defendants, acting  
24 outside of their capacities as employees of the Health District, entered into an agreement  
25 to achieve the objective of violating the plaintiffs’ rights and to induce their resignations.  
26 More particularly, the plaintiffs have not raised a triable issue of fact that the defendants

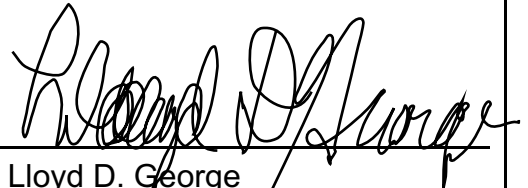


1 formed and agreed upon a course of action in any capacity other than as employees of the  
2 Health District.

3 Accordingly,

4 THE COURT **ORDERS** that Defendants' Motions for Summary Judgment (Nos. 235,  
5 236, 237, and 238) are GRANTED. The Clerk of the Court is instructed to enter judgment  
6 in favor of the defendants and against the plaintiffs.

7  
8 DATED this 29 day of September, 2017.

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11 Lloyd D. George  
12 United States District Judge  
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